



January 16, 2002

Ms. Kimberley Mickelson
Olson & Olson
333 Clay Street, Suite 3485
Houston, Texas 77002

OR2002-0265

Dear Ms. Mickelson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157422.

The City of Friendswood (the "city") received three requests for information from the same requestor, seeking correspondence between two individuals and information about the selection of the city's police chief. You inform us that most of the responsive information has been released to the requestor, but you claim that the remaining responsive information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which is a representative sample.¹

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Thus, section 552.101 encompasses information that is made confidential by another statute. You claim that the requested information is confidential under section 552.101 in conjunction with section 58.007 of the Family Code. Chapter 58 of the Family Code governs law enforcement records relating to juvenile offenders. Section 58.007 provides in relevant part:

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). In this case, you have not demonstrated that the submitted information constitutes law enforcement records and files for purposes of section 58.007. As a result, we conclude that section 58.007 is inapplicable to the submitted information; thus, you may not withhold any of the submitted information from public disclosure under that provision.

Section 552.108(a)(2) excepts from disclosure information held by a law enforcement agency or prosecutor concerning an investigation that concluded in a result other than conviction or deferred adjudication. In this case, the information you seek to withhold under section 552.108 is a series of e-mails concerning, in some instances, law enforcement personnel and activities. You have not demonstrated, however, that the information at issue is held by a law enforcement agency or prosecutor. We therefore conclude that section 552.108(a)(2) is inapplicable and that you may not withhold any of the submitted information under that provision.

Section 552.107(1) excepts information that an attorney of a political subdivision cannot disclose because of a duty to the client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107(1) protects them only to the extent that such communications reveal the attorney's legal opinion or advice. ORD 574 at 3. The submitted information contains communications between the city and its attorneys. Having reviewed these communications, we agree that, in some

instances, they reveal the city's confidences or the attorney's legal opinion or advice. Therefore, you may withhold the information we have marked under section 552.107(1).

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. In this case, you are apparently claiming that the submitted documents contain advice, opinions, and recommendations regarding the hiring process for the chief of police and various city policies. With respect to the vast majority of submitted information, however, you do not explain how it relates to the city's policymaking functions. We have therefore only marked the information that appears to us to be related to the city's policymaking functions. You may withhold the information marked under section 552.111.

Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Here, the questions do not test an individual's or group's knowledge or ability in a particular area. Moreover, it appears that the questions were developed for a specific interview process and will not be used in the future. Therefore, the city may not withhold any of the submitted information under section 552.122.

We note that the submitted information contains e-mail addresses. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential. Section 552.137 provides in relevant part:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Section 552.137 requires the city to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. As there is no indication that the member of the public consented to release in this instance, the city must withhold the e-mail addresses under section 552.137. We have marked the documents accordingly.

In sum, the city may withhold the information that we have marked under sections 552.107 and 552.111. Similarly, the city must withhold the e-mail addresses we have marked under section 552.137. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one

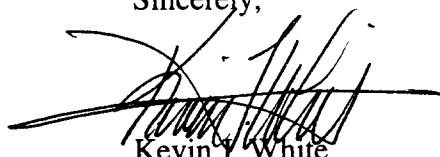
of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kevin J. White', is written over a horizontal line.

Kevin J. White
Assistant Attorney General
Open Records Division

KJW/seg

Ref: ID# 157422

Enc. Submitted documents

c: Mr. Jeff Branscome
308 Woodstream Circle
Friendswood, Texas 77546
(w/o enclosures)